IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON, Respondent/ Cross Appellant, v. RANDALL SHAWN WRIGHT, Appellant/ Cross-Respondent.	) NO. 62443-1-I))))) UNPUBLISHED OPINION))))) FILED: July 20, 2009

BECKER, J. — Randall Wright contends his stalking convictions should be reversed because the trial court gave the jury erroneous instructions and the information charging the offenses is defective. We conclude the instructional error did not affect the outcome of the trial and that any error in the information is harmless. We affirm Wright's convictions. Wright also contends his sentence is illegal. We remand for correction of the judgment and sentence.

FACTS

In March 2007, Hayden Hainsworth moved onto a rural five acre property in Arlington. Wright lived in a trailer on the adjacent property, which his parents owned. Hainsworth and Wright were initially cordial but Hainsworth eventually became alarmed at Wright's interest in her and purposefully attempted to reduce their contacts. Nevertheless, Wright appeared to be going out of his way to make contact with Hainsworth.

By early October, 2007, Hainsworth was so discomforted by Wright's attentions that she purchased 30 trees and placed them in a line as a screen between her property and the Wright's property. However, the row of trees did not cover a small area near Hainsworth's barn and Wright positioned himself there on several occasions. On two occasions he called out to her and on other occasions moved about so that he was positioned near the front or rear of her barn. On another occasion, Wright positioned himself so that he could maintain sight of Hainsworth while she was in her barn.

On October 26, 2007, Hainsworth was in her barn when she was startled by a loud noise. She went outside and observed Wright sitting on a riding lawnmower shouting obscenities. Hainsworth thought the obscenities were directed at her but was not sure. On October 27, Hainsworth went out to her patio. Wright yelled an obscenity at her. Hainsworth was frightened and went

back inside her house. The next day, Wright drove his riding mower erratically about his property, not actually mowing, while yelling obscenities. The following nights, Wright again yelled obscenities. On October 30, Hainsworth became certain the obscenities were directed at her when Wright yelled "Yeah, you fucking bitch. Yeah, you heard me, Hayden." Hainsworth called the police, who counseled her to obtain a protection order. On October 31, Hainsworth applied for such an order. She also altered her schedule in an attempt to avoid Wright but he yelled obscenities at her again. On November 1, Hainsworth obtained a protection order, which was served on November 2. She also installed security lighting, bought a rifle, and invited a friend to stay overnight because she feared for her life and felt like Wright might try to rape her. On the evening of November 1, Wright paced back and forth on his parents' property and yelled at Hainsworth and her friend for about half an hour. Wright recorded the comments, which consisted primarily of vile sexual references. Wright eventually stopped yelling.

On November 2, Hainsworth had another friend stay over. Wright again stood on his parents' property facing Hainsworth's property and yelled various sexual obscenities for about half and hour. Hainsworth recorded this diatribe and again called the police, who contacted Wright and served him with the protection order.

On November 8 and 9, Wright again yelled obscenities at Hainsworth. By this point, Hainsworth was emotionally distressed and could not eat or sleep. Police arrested Wright on the evening of November 9. Wright acknowledged that what he did was wrong and said he would not do it again but accused Hainsworth of taunting him. At a protection order hearing in district court on November 15, Wright attributed his behavior to drinking.

The State charged Wright with two counts of stalking. Count I charged a gross misdemeanor based on Wright's conduct during the period October 26 through November 2. Count II charged a felony based on Wright's conduct during the period November 8 through November 9. Count II was charged as a felony based on Wright's violation of the protection order. Each charge used the following language:

> That the defendant, … without lawful authority, intentionally and repeatedly harassed and repeatedly followed Hayden Hainsworth, and that person was placed in reasonable fear that the defendant intended to injure the person or property of another, and the defendant intended to frighten, intimidate, and harass that person; proscribed by RCW 9A.46.110(1) and (5).

Although the information charged that Wright followed Hainsworth, the parties agreed prior to trial that there was no evidence of following and the case was tried solely on the allegation that Wright "intentionally and repeatedly harassed" Hainsworth.

The court gave "to convict" instructions for each offense that were identical except for the charging dates. Each instruction listed the elements of the charged offense as follows:

> (1) That … the defendant intentionally and repeatedly harassed Hayden Hainsworth;
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> (2) That Hayden Hainsworth reasonably feared that the defendant intended to injure Hayden Hainsworth;
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> (3) That the defendant
>
> (a) intended to frighten, intimidate or harass Hayden Hainsworth; or
>
> (b) knew or reasonably should have known that Hayden Hainsworth was afraid, intimidated, or harassed even if the defendant did not intend to place her in fear or to intimidate or harass her; and
>
> (4) That the defendant acted without lawful authority; and
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> (5) That the acts occurred in the State of Washington.

The jury was instructed that elements 3(a) and 3(b) were alternatives and that only one need be proved. The language of the "to convict" instructions mirrors that set out in WPIC 36.21. The notes to the pattern instruction indicate that it is written for cases where both 3(a) and 3(b) are appropriate and should be revised in cases where one of the two alternatives is not charged or supported by the evidence. However, both defense counsel and the prosecutor proposed instructions that included both alternatives. The jury was also asked by special verdict to determine

whether Wright violated a protection order in committing Count II.

The jury returned guilty verdicts as to each count and found by special verdict that Wright violated the protection order. On the felony charge, the court imposed a sentence of nine months with a reduced sentence option for treatment. On the misdemeanor charge, the court imposed a suspended sentence of 365 days. The court directed that the misdemeanor sentence run consecutive to the felony sentence and provided that Wright was to remain on probation for 24 months following entry of the judgment and sentence on the gross misdemeanor. Wright appeals.

DECISION

Wright first contends the "to convict" instructions were erroneous and that his defense counsel was ineffective in proposing them.

Ordinarily, a defendant may not request an instruction and then argue on appeal that it was improper. State v. Studd, 137 Wn.2d 533, 546-47, 973 P.2d 1049 (1999). But this "invited error" doctrine does not preclude a claim of ineffective assistance of counsel. State v. Bradley, 141 Wn.2d 731, 736, 10 P.3d 358 (2000); State v. Aho, 137 Wn.2d 736, 745, 975 P.2d 512 (1999). We therefore address the claim under an ineffective assistance of counsel standard of review.

To establish ineffective assistance, the defendant must show deficient

performance and resulting prejudice. State v. Townsend, 142 Wn.2d 838, 843, 15 P.3d 145 (2001). Prejudice is established by showing that "there is a reasonable probability that, but for counsel's error, the result would have been different." State v. Townsend, 142 Wn.2d at 844. If a defendant fails to show either prong, the claim fails. In re Woods, 154 Wn.2d 400, 420, 114 P.3d 607 (2005); State v. Hendrickson, 129 Wn.2d 61, 78, 917 P.2d 563 (1996).

RCW 9A.46.110 lists the elements necessary to convict on a charge of stalking, providing, in part:

> (1) A person commits the crime of stalking if, without lawful authority and under circumstances not amounting to a felony attempt of another crime:
> (a) He or she intentionally and repeatedly harasses or repeatedly follows another person; and
> (b) The person being harassed or followed is placed in fear that the stalker intends to injure the person, another person, or property of the person or of another person. The feeling of fear must be one that a reasonable person in the same situation would experience under all the circumstances; and
> (c) The stalker either:
> (i) Intends to frighten, intimidate, or harass the person; or
> (ii) Knows or reasonably should know that the person is afraid, intimidated, or harassed even if the stalker did not intend to place the person in fear or intimidate or harass the person.
> (2)(a) It is not a defense to the crime of stalking under subsection (1)(c)(i) of this section that the stalker was not given actual notice that the person did not want the stalker to contact or follow the person; and
> (b) It is not a defense to the crime of stalking under subsection (1)(c)(ii) of this section that the stalker did not intend to frighten, intimidate, or harass the person.

Stalking is a gross misdemeanor but becomes a felony if the stalking violates a

protection order. RCW 9A.46.110(5)(b)(ii).

The statute appears to set out three elements to the offense of stalking, two of which may be committed in different ways. The first element is that the defendant intentionally and repeatedly harasses another person or repeatedly follows another person. The parties agreed before trial that the "following" way of committing the offense was not at issue and the case was tried solely on the intentional and repeated harassment allegation. There is no issue regarding this element. The second element is that the victim is placed in fear. There is no dispute that Hainsworth was placed in fear and no issue regarding this element. The final element is that the defendant either intended to frighten, intimidate, or harass the victim or that the defendant knew or reasonably should have known that the person was afraid, intimidated, or harassed. Wright was charged only with intending to frighten, intimidate, or harass the victim. But the jury was instructed that it could find Wright guilty if it found he knew or should have known that the victim was afraid, intimidated or harassed. As there is no apparent explanation or reason for allowing the jury to be instructed that it could return convictions if Wright committed conduct that was not charged, we presume that counsel was ineffective in proposing these instructions. Wright, however, fails to show prejudice.

Offering an uncharged means as a basis for a conviction is prejudicial if

the jury might have returned a conviction under the uncharged means, State v. Doogan, 82 Wn. App. 185, 189, 917 P.2d 155 (1996), but harmless if the jury could not have returned a conviction on the basis of the uncharged means. State v. Nicholas, 55 Wn. App. 261, 273, 776 P.2d 1385 (1989). In this case, the first element of RCW 9A.46.110 provides for alternate means of committing stalking. But if a case is tried only as to the first of these means, there are not truly alternate ways of committing the third element. Under the instructions given, the jury was required to unanimously find as to the first element that Wright intentionally and repeatedly harassed Hainsworth. Having so found, the jury must also have found as to the third element that Wright intended to frighten, intimidate or harass Hainsworth. It is not possible to intentionally harass someone without intending to harass them. Thus, even though the jury was allowed to consider an alternative way to satisfy the third element, it could not have returned a conviction under these instructions without unanimously finding that Wright committed the offense as charged. Under these circumstances, Wright cannot show a reasonable probability that but for counsel's error the result would have been different. Wright's ineffective assistance of counsel claim therefore fails.

Wright also contends that the information charging the offenses is defective because it did not give him notice that he could be convicted under

RCW 9A.46.110(1)(c)(ii), the "knows or reasonably should know" method of satisfying the third element. The error, however, is not in the information but in the instructions. But because Wright must have been convicted based on the allegation charged, he cannot show he was prejudiced by any lack of notice as to the uncharged means. This contention also fails.

Wright finally contends that the trial court exceeded its authority in sentencing him to 24 months probation on the gross misdemeanor.

The judgment and sentence for the gross misdemeanor contains a pre-printed entry allowing the trial court to check one of two choices, to defer execution of the sentence pursuant to RCW 9.95.210, or to suspend execution of the sentence pursuant to RCW 9.92.060. The trial court checked a box indicating it was suspending execution of all 365 days of the sentence under RCW 9.92.060. On the second page of the judgment and sentence, the trial court set Wright's probation expiration date at 24 months following entry of the sentence.

RCW 9.95.210 allows a trial court to suspend the execution of a sentence on such conditions as it designates for a period not exceeding the maximum term of the sentence or two years, whichever is longer. RCW 9.92.060 allows a trial court to stay or suspend a sentence. When a court grants a suspended sentence under RCW 9.92.060, it is required under RCW 9.92.064 to establish a

termination date for the suspended sentence which is no later than the time the original sentence would have elapsed. Either statute may be used to suspend the execution of a sentence. State v. Davis, 56 Wn.2d 729, 737, 355 P.2d 344 (1960). Wright contends that because the trial court checked the box indicating it was suspending the sentence under RCW 9.92.060, it is limited to imposing probation for only the maximum term of the gross misdemeanor sentence, one year. The State contends that checking the box referring to RCW 9.92.060 is clerical error.

It appears from the court's comments and its imposition of 24 months probation that it meant to proceed under RCW 9.95.210. But rather than guess at the court's intentions, we remand the matter to the trial court for such correction of the judgment and sentence as it deems appropriate. Contrary to Wright's argument, we do not consider this to be an uncorrectable legal error.

Wright's two convictions for stalking are affirmed and the matter is remanded to the trial court for correction of the judgment and sentence.

Becker, J.

WE CONCUR:

Cox, J.

Leach, J.